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INTRODUCTION

Employing a strategy of avoidance and selective citation, Respondent attempts to focus the Court's attention away from the central issue in this case. That issue is whether Missouri trial courts may exercise their jurisdiction to rewrite settlement agreements freely negotiated by litigants in the State of Missouri. Parties must know that when they enter into a settlement agreement, they can rely on that settlement being enforced according to its terms and can rely on that settlement meaning the finality of litigation. In this case, it has not.

Missouri law is clear that where a trial court acts in the absence of *or in excess of* its jurisdiction, prohibition must be available to a litigant to prohibit that action immediately and without further undue and unnecessary expense. *Mo. State Bd. of Registration for Healing Arts v. Brown*, 121 S.W.3d 234, 236 (Mo. banc 2003). Respondent would have this Court believe that prohibition is appropriate only when a trial court lacks jurisdiction over the parties to an action or jurisdiction over the general subject matter of an action. That is not the law in Missouri. Even if a trial court possesses *general* personal and subject matter jurisdiction over a case, it still may *exceed* that jurisdiction by taking a particular action that it lacks the power to take. *Id.*

On June 23, 2004, when Respondent entered the Order and Judgment of Dismissal with Prejudice (the "June 23 Judgment"), he lacked the power to take any action other than was necessary to enforce the terms of the settlement agreement executed on January 2, 2004 (the "Settlement Agreement") by the plaintiffs in the underlying litigation (the "Lavelocks"). Rather than enforce the Settlement Agreement according to its terms,

Respondent ordered Cooper Tire to create and publicly file with the trial court an index of the confidential documents Cooper Tire had produced during the pendency of the underlying litigation. Respondent's order imposed obligations on Cooper Tire that exceeded and were contrary to the terms of the Settlement Agreement. Because Respondent exceeded his jurisdiction in imposing obligations on Cooper Tire that were contrary to and in excess of the terms of the Settlement Agreement, this Court should make its preliminary writ of prohibition absolute.

Respondent sets forth a litany of arguments that are, in the end, unnecessary for this Court to decide. This Court needs only to determine whether the obligation to create and file an index of confidential documents was a requirement of the Settlement Agreement. If it was not, Respondent's June 23 Judgment was void for want of jurisdiction to the extent it imposed such an obligation, and the resulting contempt judgment entered by Respondent on December 13, 2004 (the "December 13 Contempt Judgment") is likewise void. Because void judgments entered in excess of a trial court's jurisdiction can be attacked at any time, in any proceeding, including by way of prohibition, this Court properly may make its preliminary writ of prohibition absolute.

Moreover, it makes no difference that an additional remedy may be available to Cooper Tire by direct appeal, or that Cooper Tire in fact has filed a direct appeal to protect its rights. Under Missouri Rule of Civil Procedure 84.22, the remedy by appeal must be *adequate*. This Court recognizes that in certain cases—such as where a trial court acts in excess of its jurisdiction—prohibition is the appropriate remedy, and the remedy available by appeal in such circumstances is *by definition* inadequate.

Cooper Tire believed this litigation had ended more than one year ago, when the parties settled the underlying litigation and negotiated and executed their Settlement Agreement. Thereafter, Respondent engrafted additional obligations on Cooper Tire, purportedly at the request of the Lavelocks. Respondent's contention, raised for the first time in this writ proceeding and never mentioned in the trial court or the Court of Appeals, is that the Lavelocks have a continuing interest in Cooper Tire's confidential documents because of the possible threat that Cooper Tire may, in the future, accuse the Lavelocks of disclosing the documents in violation of the Settlement Agreement and the Protective Order of Confidentiality (the "Protective Order"). The record plainly reveals, however, that the Lavelocks' *attorneys* wanted a publicly-filed index of Cooper Tire's confidential documents for the unabashedly-stated purpose of preserving evidence for *unrelated cases in other courts*.

Respondent's order requiring Cooper Tire to create and publicly file an index of its documents changed Cooper Tire's obligations under the Settlement Agreement and thereby exceeded Respondent's jurisdiction. When Respondent entered the June 23 Judgment, his jurisdiction was limited to enforcing the parties' Settlement Agreement. In the June 23 Judgment, however, not only did Respondent (in dismissing the case) order the parties to comply with the Settlement Agreement, but he also imposed additional, not-bargained-for obligations on Cooper Tire for purposes unrelated to any then-existing dispute between the parties.

If parties like Cooper Tire cannot rely on time-honored rules regarding the finality of settlements, Missouri's policy of encouraging settlements will be thwarted. If this

Court does not make its preliminary writ of prohibition absolute, it will signal to Missouri litigants that Missouri's trial court judges—not the parties—ultimately determine the terms of a settlement agreement. Parties' general releases included in settlement agreements would then become a practical nullity in the State of Missouri. To uphold the long-standing public policy and the established jurisprudence of this state encouraging and honoring settlement agreements, this Court should make its preliminary writ of prohibition absolute.

ARGUMENT

I. Because Respondent exceeded his jurisdiction in requiring Cooper Tire to create and file with the trial court an index of its confidential documents, and because there was no justiciable issue concerning the documents at the time Respondent entered the June 23 Judgment, a writ of prohibition should issue to prevent enforcement of that portion of the June 23 Judgment requiring Cooper Tire to create and file a document index and of the resulting December 13 Contempt Judgment.

“The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction.” *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991) (citing *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo. App. E.D. 1980)). Respondent recognizes and invokes this principle in his brief (*see* Resp. Brief at 18), and Cooper Tire could not agree more. Respondent, however, ignores the import of this principle, and launches into a discussion of the trial court’s jurisdiction over the *general subject matter* of the case, rather than Respondent’s jurisdiction and authority to take the *particular action* of requiring Cooper Tire to create and file an index of its confidential documents. It is this latter species of jurisdiction that is at issue in this case, and that requires the writ of prohibition be made absolute. Cooper Tire does not argue, and *never has* argued, that Respondent lacked jurisdiction over the general subject matter of this case, as Respondent seems to believe.

Cooper Tire seeks a writ of prohibition because Respondent acted in excess of his subject matter jurisdiction when he ordered Cooper Tire to create and file with the trial court an index of confidential documents produced by Cooper Tire in the underlying litigation. Correcting an act in excess of a court's jurisdiction is one of the "extraordinary circumstances" in which this Court has recognized that a writ of prohibition is appropriate. *See Mo. State Bd. of Registration for Healing Arts v. Brown*, 121 S.W.3d 234, 236 (Mo. banc 2003); *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994). Cooper Tire properly seeks an absolute writ of prohibition to remedy Respondent's jurisdictional excess in entering the June 23 Judgment and the resulting December 13 Contempt Judgment. Accordingly, this Court properly may issue such a writ.

A. A writ of prohibition should issue in this case because Respondent's requirement that Cooper Tire create and file an index of its confidential documents was in excess of Respondent's jurisdiction, rendering void that portion of the June 23 Judgment and, thus, rendering void the resulting December 13 Contempt Judgment.

A writ of prohibition is available primarily in "three, fairly rare, categories of cases." *State ex rel. Anderson v. Nixon*, ___ S.W.3d ___, 2005 WL 647549, at *2 (Mo. App. W.D. 2005). Less than two years ago, this Court delineated those three categories:

A writ of prohibition is appropriate whenever: 1) the trial court exceeded its personal or subject matter jurisdiction; 2) the trial court exceeded its jurisdiction or abused its

discretion to such an extent that it lacked the power to act as it did; or 3) there is no adequate remedy by appeal for the party seeking the writ, and the “aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision [of the lower court].”

Brown, 121 S.W.3d at 236 (Mo. banc 2003) (quoting *Chassaing*, 887 S.W.2d at 577). This Court further noted that “[a] writ is also appropriate to prevent unnecessary, inconvenient, and expensive litigation.” *Id.* (quoting *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 857 (Mo. banc 2001)).

Only the third category of cases listed by the Court in *Brown* contains an explicit requirement that a party seeking a writ lack an adequate remedy via appeal. 121 S.W.3d at 236. If a trial court exceeds its jurisdiction or lacks the power to enter a particular judgment, the Court *assumes* that a remedy via appeal is *inadequate*, because a court’s judgment is void to the extent it exceeds its subject matter jurisdiction. *See Christian Health Care of Springfield W. Park, Inc. v. Little*, 145 S.W.3d 44, 55 (Mo. App. S.D. 2004) (holding that portion of trial court’s judgment that exceeded its subject matter jurisdiction was void but affirming judgment in all other respects).

Nearly 70 years ago, this Court set forth the fundamental tenet of Missouri law that authorizes a writ of prohibition in this case:

It will not do to say that, because the court had jurisdiction of the subject matter . . . and of the parties, any order made or judgment rendered in that action, if wrong, was

merely erroneous, but not void for want of jurisdiction. Although a court has jurisdiction of the subject matter of an action and of the parties, it cannot exceed that jurisdiction. It must have authority to render the particular judgment in the particular case.

. . . .

Even where a court has jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void. Thus, a judgment may be collaterally attacked where the court had jurisdiction of the parties and subject-matter of the action, but did not have jurisdiction of the question which the judgment assumed to determine, or power to grant the particular relief which it assumes to afford to the litigants.

Aetna Ins. Co. v. O'Malley, 342 Mo. 800, 118 S.W.2d 3, 9–10 (banc 1938) (citation and internal quotation omitted). The Court of Appeals restated the rule twenty years ago:

It is a well-recognized principle that in order for a court to acquire jurisdiction to adjudicate, it must have jurisdiction of the subject matter, jurisdiction of the *res* or the parties, and jurisdiction to render a particular judgment in a particular case. A judgment entered in excess of or beyond the

jurisdiction of the trial court is void and the court of appeals
has no jurisdiction to review.

Schneider v. Sunset Pools of St. Louis, Inc., 700 S.W.2d 137, 138 (Mo. App. E.D. 1985). In its 2003 decision in *Brown*, this Court merely reiterated and reemphasized the long-standing law of this state that authorizes a writ of prohibition where a trial court acts in excess of its jurisdiction.

To the extent the June 23 Judgment exceeded Respondent’s jurisdiction, the June 23 Judgment is void. *Aetna*, 342 Mo. 800, 118 S.W.2d at 9–10; *Schneider*, 700 S.W.2d at 138. A void judgment may be attacked, directly or collaterally, at any time, in any proceeding, including a prohibition proceeding. *La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1955); *State ex rel. Mohart v. Romano*, 924 S.W.2d 537, 541, *reh’g & transfer denied* (Mo. App. W.D. 1996). Indeed, the Court’s opinion in *Brown* contains no discussion of whether the relator had appealed or could have appealed the trial court’s decision, because the Court based its holding on the fact that the trial court acted in excess of its jurisdiction—a proper basis for a writ to issue. *See* 121 S.W.3d at 237–38.¹

¹ In *Brown*, this Court made absolute a preliminary writ of prohibition, holding that a trial court had exceeded its jurisdiction in remanding a case to an administrative agency for findings of fact on an equal protection claim. *Id.* at 237–38. The trial court based its remand on Mo. Rev. Stat. § 536.140, which allows courts reviewing administrative agency decisions to order such further action by the agency “as it may be proper to require” *Id.* at 237 (quoting Mo. Rev. Stat. § 536.140.5). Although the Court noted

Respondent argues at length that the June 23 Judgment was proper *in toto* because he possessed general subject matter jurisdiction over the underlying lawsuit and over the enforcement of the Settlement Agreement. In making these arguments, Respondent successfully defeats a straw man. Indeed, this Court in *Brown* did *not* hold that the trial court lacked subject matter jurisdiction over the case in general. Like Respondent in this case, the trial court in *Brown* clearly had jurisdiction over the general subject matter of the cause of action, and the case was properly before the trial court. However, the particular act of remanding the case to the administrative agency for findings of fact was an act that exceeded the trial court’s jurisdiction—just as Respondent’s act of entering a judgment that exceeded and contradicted the terms of the parties’ Settlement Agreement exceeded Respondent’s jurisdiction in this case. *See id.*

Cooper Tire never has contended that the June 23 Judgment is void in its entirety. Rather, Cooper Tire consistently has averred that the June 23 Judgment is void only to the extent that it exceeded and contradicted the terms of the parties’ Settlement Agreement by requiring Cooper Tire to create and file with the trial court an index of its

that it is often “proper” for a court to remand a case when an agency’s findings of fact are not specific enough to allow meaningful review of a decision, an equal protection claim is not a proper case for remand. *Id.* Thus, the trial court in *Brown* had two options: (1) decide the case on the record before it, or (2) reopen the case for the presentation of additional evidence. *Id.* By remanding the case to the administrative agency, the trial court had “exceeded its jurisdiction,” and prohibition was appropriate. *Id.* at 237–38.

confidential documents. *To that extent*, Respondent lacked subject matter jurisdiction to enter the June 23 Judgment, and *that portion* of the June 23 Judgment is, therefore, void. *See Christian Health Care*, 145 S.W.3d at 55 (Mo. App. S.D. 2004); *see also Chuning v. Calvert*, 452 S.W.2d 580, 585 (Mo. App. K.C. 1970) (holding that because a petition to intervene in a case failed to state a cause of action, the trial court lacked jurisdiction to hear and rule on the petition to the extent that the petition was the subject matter of the action). Accordingly, the resulting December 13 Contempt Judgment also is void. *Mohart*, 924 S.W.2d at 541.

B. An executed settlement agreement alters the general subject matter jurisdiction of a court and limits its subject matter jurisdiction to entering orders necessary to effectuate the settlement agreement.

Cooper Tire never has contended that the trial court did not have jurisdiction over the general subject matter of the underlying lawsuit. Rather, the parties' Settlement Agreement placed limits on Respondent's jurisdiction—limits Respondent exceeded by requiring Cooper Tire to create and file an index of its confidential documents, contrary to the explicit terms of the Settlement Agreement.

The subject matter jurisdiction of a Missouri trial court is not limitless. A settlement agreement limits the jurisdiction of the trial court because it compels a judgment that is "contractual in nature" and "does not represent the decision of a judge after a hearing upon disputed issues." *See Am. Family Mut. Ins. Co. v. Hart*, 41 S.W.3d 504, 510 (Mo. App. W.D. 2001) (noting that trial court lacks power to order payment of prejudgment interest if the parties' agreement does not provide for prejudgment interest).

Upon execution of a settlement agreement, the trial court's judgment must be "based upon the terms of the agreement between the parties," *id.*, and the court's power extends only to "enter such orders and or judgment as is necessary to complete the settlement agreement reached by the parties." *Vulgamott v. Perry*, 154 S.W.3d 382, 393 (Mo. App. W.D. 2004).²

That portion of the June 23 Judgment in which Respondent imposed on Cooper Tire an obligation to create and file an index of confidential documents exceeded and contradicted the terms of the Settlement Agreement. Thus, that portion of Respondent's June 23 Judgment exceeded the trial court's power, which was limited to enforcing the terms of the Settlement Agreement. *Vulgamott*, 154 S.W.3d at 393; *Hart*, 415 S.W.3d at 510; *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1288 n.13 (5th Cir. 1989) (applying Texas law) (settlement agreement precluded court from considering motion for sanctions following execution of settlement agreement); *Ingram v. Star Touch Communications, Inc.*, 450 S.E.2d 334, 336 (Ga. App. 1994) (party could not move for attorneys' fees and

² Similarly, other legally enforceable documents may strip a trial court of its jurisdiction to take a particular action. For instance, a settlor's will may prevent a court from issuing a judgment that terminates a trust in a particular way. *See State ex rel. Eichorn v. Luten*, 515 S.W.2d 857, 859–60 (Mo. App. St. L. 1974) (holding that trial court's termination of trust and distribution of trust assets contrary to terms of trust and without consent of all beneficiaries exceeded court's jurisdiction, notwithstanding presence of jurisdiction over parties and over general subject matter of litigation).

costs following general release settlement which did not provide for recovery of such fees).

To the extent the June 23 Judgment exceeded Respondent's jurisdiction, it is void, *Christian Health Care*, 145 S.W.3d at 55, and the Court may make its preliminary writ of prohibition absolute on that basis. *Brown*, 121 S.W.3d at 236; *La Presto*, 285 S.W.2d at 570. Furthermore, the December 13 Contempt Judgment also is void because it results from that portion of the June 23 Judgment Respondent was without jurisdiction to enter. *Mohart*, 924 S.W.2d at 541. Therefore, this Court also may make its preliminary writ of prohibition absolute as to the December 13 Contempt Judgment.

C. The Lavelocks have no continuing interest in Cooper Tire's confidential documents and, accordingly, had no standing to seek post-settlement relief relating to those documents.

Standing is a threshold requirement without which a court has no power to grant the relief requested. *Querry v. State Highway & Transp. Comm'n*, 60 S.W.3d 630, 634 (Mo. App. W.D. 2001). Recognizing that standing requires the moving party to have "a personal stake [in the action] arising from a threatened or actual injury," *Thruston v. Jefferson City Sch. Dist.*, 95 S.W.3d 131, 134 (Mo. App. W.D. 2003), Respondent tries in vain to articulate a basis upon which the Lavelocks maintained some post-settlement interest in Cooper Tire's confidential documents. Respondent's attempt fails.

The Settlement Agreement required the Lavelocks to return to Cooper Tire all confidential documents that had been produced by Cooper Tire in the underlying litigation, vesting absolute control over those documents in Cooper Tire alone. (Apx.

Tab E, at A-43–A-44; Tab D, at A-38.)³ Moreover, the Lavelocks expressly obligated themselves, both in an August 2001 agreed Protective Order of Confidentiality and in the Settlement Agreement, to use the confidential documents only for purposes of the underlying litigation and to return possession and control of those documents to Cooper Tire at the termination of the underlying litigation. (Apx. Tab E (under Seal), at A-43–A-44; Tab D at A-35, A-38.) Thus, when the Lavelocks executed the Settlement Agreement on January 2, 2004 (Apx. Tab E (Under Seal), at A-45, A-47), they retained no interest in Cooper Tire’s confidential documents.

Further, the Lavelocks fully and generally released Cooper Tire in the Settlement Agreement, precluding them from seeking relief for which they did not bargain in the Settlement Agreement. “In the absence of words in the operative part of a general release which indicate an intention to limit or restrict its effect, it must be concluded that the instrument was contemplated and intended to be a complete settlement of *all matters* between the parties to the release.” *Lugena v. Hanna*, 420 S.W.2d 335, 341 (Mo. 1967) (emphasis added). For a party to retain any legal rights relating to the dispute, there must be an *express reservation* of such rights *in the settlement agreement*. *Swope v. Gen. Motors Corp.*, 445 F. Supp. 1222, 1228 (W.D. Mo. 1978) (applying Missouri law); *Sexton v. First Nat’l Mercantile Bank & Trust Co. of Joplin*, 713 S.W.2d 30, 31 (Mo. App. S.D. 1986). Because the Settlement Agreement contains no express reservation of

³ Citations to “Apx.” refer to the Supplemental Appendix to Relator’s Brief, on file with the Court.

rights in favor of the Lavelocks over Cooper Tire's confidential documents, the Lavelocks necessarily retained no such rights.

Respondent argues (for the first time) that because the trial court maintains jurisdiction to enforce the terms of the parties' Settlement Agreement and any breach of the Protective Order entered in the underlying litigation, the Lavelocks have an interest in an index of Cooper Tire's confidential documents being created and publicly filed. As Respondent reasons, the Lavelocks—recognizing their obligation to maintain the confidentiality of Cooper Tire's documents and not to disclose those documents or their contents—anticipate the possibility that, at some future date, Cooper Tire may allege the Lavelocks have breached the Settlement Agreement. In the event Cooper Tire were to make such a charge at some time in the future, the Lavelocks *then* may be required to defend against such a charge. According to Respondent, however, the Lavelocks must have the identity of those documents publicly disclosed *today* by an index of those documents being created and filed with the trial court. Respondent's argument is, quite simply, illogical.

First, Respondent's argument presumes that *public* disclosure of the identity of Cooper Tire's *confidential* documents is necessary for the very purpose of guarding against a potential future charge of improper disclosure of the documents at issue. Public disclosure of the identity of confidential documents is not an appropriate remedy to guard against a potential dispute regarding the potential disclosure of those very documents. The purported remedy creates the very problem the parties sought to protect against by

entering a Protective Order in the first place. At best, Respondent's argument exhibits circular reasoning.

Next, the nature of the argument itself admits the Lavelocks lack standing to seek the relief requested. Respondent acknowledges that no *present* dispute regarding the documents exists. Rather, Respondent attempts to suggest—for the first time since this dispute initiated—that the potential of a *future* dispute regarding Cooper Tire's confidential documents gives rise to an immediate need to disclose their identity publicly, and that this potential for a future dispute supports Respondent's June 23 Judgment ordering Cooper Tire to create and file an index of its confidential documents. Respondent has spun this argument in an attempt to assert that the Lavelocks have a potential "personal stake" in the documents themselves. To have standing, however, the Lavelocks must have "a personal stake *arising from a threatened or actual injury.*" *Thruston*, 95 S.W.3d at 134 (emphasis added). Because Cooper Tire has not asserted the Lavelocks violated the Settlement Agreement or the Protective Order by disclosing the documents at issue, there is no threatened injury to the Lavelocks, much less any actual injury. Accordingly, the Lavelocks lacked standing to seek the relief requested.

Further, there is no practical support for the argument Respondent posits. The very premise of Respondent's argument is that the Lavelocks may be required to defend against a claim that they improperly disclosed Cooper Tire's confidential documents. According to Respondent, a publicly filed index of Cooper Tire's confidential documents will allow the Lavelocks to defend against such a charge and, therefore, provides a practical basis to support imposing on Cooper Tire a post-settlement obligation to create

and file an index of its confidential documents. Even if this were true, it would not vest the Lavelocks with standing to seek the relief requested and would not vest Respondent with jurisdiction to impose obligations on Cooper Tire that exceed and contradict the parties' negotiated Settlement Agreement. Moreover, the alleged practical basis is simply *not present*. In the event Cooper Tire were to discover the Lavelocks had violated their obligation to maintain the confidentiality of Cooper Tire's documents, the burden to prove such a breach would be on Cooper Tire. As a result, it would be incumbent upon Cooper Tire to present evidence at that time sufficient to establish the basis for the allegations made, rather than incumbent on the Lavelocks to refute an unsupported allegation.

Finally, Respondent ignores that the documents returned to Cooper Tire were Bates stamped in the underlying action, and—consistent with the requirements of the parties' Settlement Agreement and the Protective Order—the Lavelocks returned those documents with a cover letter which identifies by Bates number the documents being returned. (*See* Apx., Tab D, p. A-38.) That cover letter, as required by paragraph 14 of the Protective Order, is in the parties' possession and is sufficient to create a record by which Cooper Tire's confidential documents can be identified by either party in the event a dispute arises at some point in the future regarding the Lavelocks' continuing obligation to maintain the confidentiality of those documents. Moreover, Respondent's argument that Cooper Tire should be required to create and file an index identifying with specificity the subject matter of its confidential documents absolutely contradicts the Protective

Order's further requirement that the cover letter itself is required *not* to disclose the substance of the documents being transmitted. (*See* Apx., Tab D, A-38.)

D. The Settlement Agreement rendered moot any interest in Cooper Tire's documents the Lavelocks had during the pendency of the underlying litigation.

Similar to the doctrine of standing, mootness is an issue of justiciability which prohibits a court from entering a judgment or opinion on an issue for which no then-existing controversy exists. *See State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001); *Local Union 1287 v. Kansas City Area Transp. Auth.*, 848 S.W.2d 462, 463 (Mo. banc 1993); *Shaw v. Ferguson Med. Group., L.P.*, 121 S.W.3d 557, 558 (Mo. App. E.D. 2003). As set forth above, Respondent acknowledges that no controversy regarding Cooper Tire's confidential documents existed at the time the Court entered its June 23 Judgment. Accordingly, to the extent Respondent imposed obligations on Cooper Tire regarding its confidential documents that were contrary to the parties' negotiated Settlement Agreement, the June 23 Judgment is void *ab initio*. As Respondent's Opposition makes clear, the only basis for that portion of its Judgment imposing obligations on Cooper Tire that exceeded and contradicted the parties' Settlement Agreement was to prepare the Lavelocks to defend a potential future controversy which could arise in the event the Lavelocks failed to comply with their continuing obligation to maintain the confidentiality of Cooper Tire's documents.

Respondent has not asserted in any of its pleadings before this Court—or ever, for that matter—that any controversy existed at the time the Lavelocks filed their post-

settlement motion asking Respondent to impose additional obligations on Cooper Tire or at the time Respondent entered his June 23 Judgment with respect to Cooper Tire's confidential documents. Initially, the Lavelocks argued Respondent should impose additional post-settlement obligations on Cooper Tire that contradict the parties' Settlement Agreement in order "to ease the discovery process in other cases" where other parties may have a lawsuit against Cooper Tire. (*See* Apx., Tab F, p. A-51.) Recognizing that such an argument necessarily rendered the request non-justiciable, Respondent now attempts to assert that the Lavelocks actually did have an interest in the documents themselves. In the attempt to establish the Lavelocks' interest in those documents, however, Respondent acknowledges that any potential interest was not "immediate" but, rather, based on a future event that may never occur. Any interest the Lavelocks had in the documents became moot when they executed the Settlement Agreement. That the only two arguments ever raised to support the need for Respondent to enter an order altering the terms of the parties' Settlement Agreement with respect to Cooper Tire's confidential documents both posit a potential future dispute merely underscores the fact that no justiciable controversy existed. Accordingly, Respondent exceeded his subject matter jurisdiction in entering that portion of the June 23 Judgment which imposed on Cooper Tire an obligation to create and file an index of its confidential documents.

E. Cooper Tire did not consent to Respondent’s exercising his jurisdiction to compel the creation and filing of an index of confidential documents.

Respondent argues that Cooper Tire agreed, under the terms of the Protective Order, that Respondent could enter an order requiring the creation and filing of an index of Cooper Tire’s confidential documents. The Protective Order provides:

16. JURISDICTION. This Court shall retain jurisdiction indefinitely with respect to enforcement of and/or any dispute regarding the improper use of confidential material, to modify the terms of this Order, or to enter further Orders regarding confidential material, *as may be necessary*.

(Apx., Tab D, at p. A-39 (emphasis added).) Respondent contends that this paragraph constitutes a general consent by Cooper Tire for the trial court to enter any order of any kind relating to the documents—even where the parties have settled.

Respondent’s argument that this Court should transform paragraph 16 into a *carte blanche* consent to jurisdiction is without merit. The Protective Order was entered *for the protection of Cooper Tire*. Only Cooper Tire produced proprietary documents in the underlying litigation. The parties agreed to the trial court’s continuing jurisdiction only “*as may be necessary*.” This language evinces a clear intent that the circumstances and purposes of the Protective Order instruct and limit any future exercise of jurisdiction.

Here, the parties settled. At the moment the Lavelocks executed the Settlement Agreement, Cooper Tire’s confidential documents were no longer of any consequence to the Lavelocks. The filing of an index of Cooper Tire’s proprietary documents is not

implicated by any justiciable issue, because no justiciable issues remained after the parties settled the underlying litigation. In light of the “as may be necessary” language in the Protective Order, it is nonsensical for Respondent to argue that, even where Respondent lacked jurisdiction to enter relief, Cooper Tire nonetheless bargained for and consented to the entry of such relief contrary to its interests. Public filing of an index of Cooper Tire’s confidential documents cannot reasonably be argued to be necessary to effectuate the purposes of the Protective Order—the protection of Cooper Tire’s confidential documents *from* public disclosure or use beyond the underlying litigation.

II. There is no factual basis to support a finding of contempt.

Respondent does not argue that there is any factual basis to support the finding that Cooper Tire was in direct contempt through an alleged “stated intent not to comply with the Order and Judgment made on November 22, 2004 in Open Court.” (*See* Apx., Tab B, p. A-28.). The transcript of the November 22, 2004 hearing unequivocally establishes no such statement ever was made. (*See* Apx., Tab A, pp. A-1–A-26.) Rather, Respondent argues Cooper Tire should be penalized for failing to create and file an index of its confidential documents during the period of time between the date Respondent scheduled a hearing on Cooper Tire’s after-trial motion and November 22, 2004, the date of that hearing. It is undisputed that the hearing date for Cooper Tire’s after-trial motion was continued from September 17, 2004 until November 22, 2004 at *plaintiff’s counsel’s* request. (*See* Apx., Tabs O, P, Q, R, pp. A-251–A-256.) It is, at best, inequitable for plaintiff’s counsel to seek a continuance of that hearing as a concession for his own

vacation schedule and argue now that Cooper Tire should be penalized because the hearing occurred more than ninety days after the June 23 Judgment became final.

Furthermore, even though it occupies more than nine pages of Respondent's brief, Respondent's argument that the December 13 Contempt Judgment was appropriate because the June 23 Judgment became final prior to the November 22 hearing is nothing more than a red herring. The fact remains that, to the extent Respondent exceeded his jurisdiction by imposing on Cooper Tire obligations that exceeded and contradicted the terms of the parties' Settlement Agreement, the June 23 Judgment was rendered void *ab initio*. See *Christian Health Care*, 145 S.W.3d at 55; accord *Rouse Co. of Mo. v. Justin's, Inc.*, 883 S.W.2d 525, 529 (Mo. App. E.D. 1994). It is fundamental that a judgment may be collaterally attacked on jurisdictional grounds at any time. See *State ex rel. Div. of Family Servs. v. Bullock*, 904 S.W.2d 510, 512 (Mo. App. S.D. 1995) (quoting *K&K Invs., Inc. v. McCoy*, 875 S.W.2d 593, 597 (Mo. App. E.D. 1994)). Further, a void judgment is subject to direct or collateral attack at any time in any proceeding. *La Presto*, 285 S.W.2d at 570; *Taylor v. Taylor*, 47 S.W.3d 377, 389 (Mo. App. W.D. 2001). Accordingly, there is no requirement that Cooper Tire first exhaust its right to direct appeal prior to attacking the judgment collaterally through a writ proceeding. See *State v. Kosovitz*, 342 S.W.2d 828, 830 (Mo. 1961); *Hampton v. Hampton*, 536 S.W.2d 324, 326 (Mo. App. Spr. 1976).

How and when the June 23 Judgment became final is not at issue in this proceeding, despite the fact that nearly one quarter of Respondent's brief is devoted to this topic. Regardless of when the June 23 Judgment became final, that judgment still is

void and subject to prohibition to the extent Respondent exceeded his jurisdiction in imposing obligations on Cooper Tire that exceeded and contradicted the parties' Settlement Agreement. Because the December 13 Contempt Judgment directly arose from that portion of the June 23 Judgment that is void, the Contempt Judgment also is void. *See Mohart*, 924 S.W.2d at 541. Accordingly, this Court should make its preliminary writ of prohibition absolute as to both that portion of the June 23 Judgment that exceeded Respondent's jurisdiction and the resulting December 13 Contempt Judgment.

III. The order of contempt was criminal in nature and provides this Court an additional basis to make absolute its preliminary writ of prohibition.

Respondent cites to one of the most recent cases from this Court dealing with contempt proceedings, *In re Marriage of Crow and Gilmore*, 103 S.W.3d 778 (Mo. banc 2003), and argues that it supports a finding that Respondent's December 13 Contempt Judgment is civil, not criminal. (*See* Respondent's Brief at 20–22.) Respondent argues that *In re Crow* stands for the proposition that if the fine imposed in a contempt proceeding is a *per diem* fine, then the contempt order is *ipso facto* civil. Respondent mischaracterizes *In re Crow* and glosses over the very important distinction this Court made—that a *per diem* fine must be *compensatory* to indicate civil contempt:

“Civil contempt is intended *to benefit a party* for whom an order, judgment, or decree was entered. Its purpose is to coerce compliance with *the relief* granted.” *State ex rel.*

Chassaing v. Mummert, 887 S.W.2d 573, 578 (Mo. banc 1994).

...

When “enforcement” [of a civil contempt order] occurs depends on the remedy. Two remedies to coerce compliance are *compensatory per diem* fines and imprisonment.

103 S.W.3d at 780–81 (emphases added, internal quotation omitted).

The fine in this case is not compensatory. There was no evidence of any damage to the Lavelocks or of any harm they suffered or could suffer as a result of Cooper Tire’s failure to file an index while pursuing its judicial remedies. In fact, the fine in this case could not have been compensatory because, at the time Respondent entered the December 13 Contempt Judgment, the Lavelocks already had received their full compensatory relief through the proceeds of the settlement. Therefore, there was no “relief” intended “to benefit a party” for which it was necessary to coerce Cooper Tire’s compliance.

Missouri cases instruct that in determining whether a contempt order is civil or criminal, it is necessary to look at all of the circumstances under which the order was entered. *Teefey v. Teefey*, 533 S.W.2d 563, 565–66 (Mo. banc 1976); *Saab v. Saab*, 637 S.W.2d 790, 792 (Mo. App. E.D. 1982). The circumstances here demonstrate that the December 13 Contempt Judgment was intended to be, and is, criminal. Respondent denied the Lavelocks’ Motion for *Civil* Contempt, yet found Cooper Tire in “direct contempt” of the trial court’s authority. The *per diem* fine that Respondent imposed as a

penalty for the alleged contempt was not and could not have been compensatory. *See In re Crow*, 103 S.W.3d at 781; *Redifer v. Redifer*, 650 S.W.2d 26, 28 (Mo. App. E.D. 1983) (“[C]ivil contempt is remedial in nature. It provides a coercive means of compelling one party to deliver or perform the relief granted *to the other party*.”) (emphasis added). The fine was made payable to the Administrator of the Circuit Court of Jackson County, not to the Lavelocks. While Respondent is correct that the December 13 Contempt Judgment is coercive, it also is clearly punitive. Taking into account all of the circumstances, the conclusion is inescapable that Respondent’s December 13 Contempt Judgment is one of criminal, not civil, contempt.

As set forth in Cooper Tire’s opening brief, prohibition is the only means by which to obtain redress of a criminal contempt order. However, whether the contempt order is criminal or civil does not dictate the propriety of prohibition as a remedy in this case. Regardless of whether the contempt is denominated civil or criminal, Respondent exceeded his jurisdiction in entering that portion of the June 23 Judgment requiring Cooper Tire to create and file an index of its confidential documents, rendering that portion of the judgment void. Because the December 13 Contempt Judgment arose directly from that portion of the June 23 Judgment that is void for want of jurisdiction, the December 13 Contempt Judgment also is void. Accordingly, prohibition is the appropriate remedy in this case, and this Court should make its preliminary writ of prohibition absolute as to that portion of the June 23 Judgment that imposes an obligation on Cooper Tire to create and file an index of its confidential documents, and as to the resulting December 13 Contempt Judgment.

CONCLUSION

For the foregoing reasons and those set forth in its opening brief, Relator Cooper Tire & Rubber Company respectfully requests that this Court make its preliminary Writ of Prohibition against Respondent, the Honorable W. Stephen Nixon, absolute. Because both Judgments are—in whole or in part—void, Cooper Tire requests that this Court enter its Order vacating both the December 13 Contempt Judgment and that portion of the June 23 Judgment that imposes an obligation on Relator to create and file with the trial court an index of its confidential documents. Respondent should be precluded from enforcing both his June 23, 2004 Judgment as it relates to the imposition of an obligation on Relator to create and file an index of confidential documents it produced in the underlying case and his December 13, 2004 Contempt Judgment finding Relator in contempt and assessing a *per diem* fine.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 84.06(c)

I hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and that it contains 7,193 words. I further certify that Microsoft Word for Windows 2000 was used to prepare this Brief and that I have provided the Clerk of the Court and Respondent's counsel with a 3-1/2 inch computer diskette containing the full text of this brief, labeled with the case name and number. I further certify that the diskettes were scanned and are virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via First-Class U.S. mail, postage prepaid, on this 25th day of April, 2005, upon the following:

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